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IN THE

Supreme Court of the United States

LONNIE WEEKS, JR.,

Petitioner,

vs.

RONALD ANGELONE, DIRECTOR,
Virginia Department of Corrections,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

In the penalty phase of a capital case (1) the trial judge gave a correct instruction which explained that the death sentence was not mandatory and that defendant's mitigating evidence must be considered, (2) a question from the jury indicated one or more jurors did not understand, and (3) after giving defense counsel notice and an opportunity to be heard, the trial judge determined that the best clarification under the circumstances was to pinpoint the instruction and paragraph that answered the jury's question:

1. Is responding to the question in this manner within the trial judge's discretion?

2. Would a negative answer to Question 1 be a "new rule" within the meaning of *Teague* v. *Lane*?

3. Is a negative answer to Question 1 "clearly established Federal law, as determined by" this Court, within the meaning of 28 U. S. C. § 2254(d)(1)?

4. Is Question 1 a federal constitutional question at all?

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

This case involves a claim that the trial court violated the Constitution of the United States by referring the jury, in

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1. Rule 37.6 Statement: This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

Both parties have given written consent to the filing of this brief.

answer to a question, to a previously given, correct, pertinent instruction. Not only that, but the claim asserts that this rule is established law, so that all cases with this "error" are subject to collateral attack, no matter how long the judgments have been final. A decision overturning large numbers of final judgments which were entered in accordance with well-established practices would be contrary to the interests of victims and society which CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

On February 24, 1993, Virginia State Trooper Jose M. Cavazos stopped a car speeding down Interstate Route 95. Defendant Lonnie Weeks, a passenger, got out of the car at the officer's direction. Weeks then fired six shots, killing Trooper Cavazos. The officer's gun was still strapped in its holster. Weeks had stolen the car in the course of a household burglary. *Weeks* v. *Commonwealth*, 450 S. E. 2d 379, 382-383 (Va. 1994). There is no dispute on guilt of the offense. See Brief for Petitioner 2.

In the penalty phase, the trial judge instructed the jury with the standard instruction, subsequently upheld as correct in *Buchanan* v. *Angelone*, 522 U. S. 269, 277-278, n. 4 (1998). Compare *id.*, at 272, n.1, with J. A. 192-193. In addition, the trial judge in the present case did what Buchanan complained was not done in his case: "provide the jury with express guidance on the concept of mitigation . . . ." Compare 522 U. S., at 275, with J. A. 195. In oral argument, defense counsel told the jury, without objection, "you could still find that he meets both of these criterias [sic] [aggravating circumstances], and not sentence him to death." J. A. 212.

During deliberations, the jury asked the following written question:

> "If we believe that Lonnie Weeks, Jr., is guilty of at least 1 of the alternatives, then is it our duty as a jury to issue the death penalty? or must we decide (even though he is guilty on one of the alternatives) whether or not to issue the death penalty, or one of the life sentences? What is the Rule please clarify." J. A. 217 (underlines in original).

The trial judge notified counsel. J. A. 222. The judge indicated that a supplemental instruction would not improve on the original and that the best course was to refer the jury to the particular paragraph that answered their question. J. A. 223. After considering defense counsel's argument for a supplemental instruction, the judge reiterated his earlier conclusion. J. A. 223-224.

When the jury returned its verdict, the clerk read the form expressly stating that they had "considered the evidence in mitigation of the offense . . . ." J. A. 225. Upon request of defense counsel, each of the twelve jurors orally affirmed that was their verdict. J. A. 225-226.

SUMMARY OF ARGUMENT

In the guilt phase of criminal trials, the rule is well established that the trial judge has discretion to answer jury questions by referring them to correct, pertinent, previously given instructions. Mere reference would be an abuse of discretion where the instruction did not address the point on which the jury was confused, but that is not the case here. There is no justification for creating a different rule for the penalty phase of capital cases. Sentencing is subject to lesser procedural requirements than the guilt trial, not greater, even in capital cases.

This case is subject to the new 28 U. S. C. § 2254(d), and petitioner's claim should be evaluated under that standard. Petitioner does not seek to apply a general standard designed for applications to myriad factual situations; he seeks to create a crystallized rule of law applicable to a specific, recurring

situation. This would be a "new rule" under *Teague* v. *Lane*, and it is not "clearly established" under § 2254(d).

The question in this case should not be considered a constitutional question at all. *Furman* v. *Georgia* and its progeny should be limited to systemic defects which render a state's system as a whole capricious. The myriad issues that arise in a penalty trial conducted under a constitutional structure should be considered questions of state law.

ARGUMENT

Case law before the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") has established a regular order for the consideration of habeas claims. Issues which preclude a court from reaching the question should be considered first. See *Steel Co.* v. *Citizens for a Better Environment*, 523 U. S. 83, 94-95 (1998) (jurisdictional before nonjurisdictional); *Lambrix* v. *Singletary*, 520 U. S. 518, 524 (1997) (procedural default ordinarily before *Teague*). The rule of *Teague* v. *Lane*, 489 U. S. 288 (1989) (plurality opinion), precluding the creation or application of new rules on habeas, should be considered next. See *Caspari* v. *Bohlen*, 510 U. S. 383, 389 (1994) ("the court *must* apply *Teague* before considering the merits of the claim").

With the enactment of the AEDPA, Congress has added an additional limitation analogous to the law-of-the-case doctrine. See Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power, 98 Colum. L. Rev. 888, 953 (1998); Brief of the Criminal Justice Legal Foundation as *Amicus Curiae* in *Williams* v. *Taylor*, No. 98-8384, pp. 2-6 ("CJLF *Williams* Brief"). Although this rule proceeds on a different theoretical basis than *Teague*, it involves some of the same subsidiary questions, see CJLF *Williams* Brief 25-26, and it makes sense to consider it at the same step of the analysis as *Teague*.

This brief *amicus curiae* will not address the procedural default question. We will begin with the survey of the legal landscape which begins a *Teague* analysis, see *Bohlen*, *supra*, 510 U. S., at 390, and then proceed to application of *Teague* and AEDPA. Finally, we inquire whether these kinds of discretionary decisions by trial judges should really be considered constitutional issues at all.

I. The trial judge has the discretion to answer a jury question by referring them to a previously given, correct, pertinent instruction, under well-established practice.

When a jury asks a question that indicates at least one juror misunderstands the instructions, may a trial judge answer them by referring them to the specific paragraph of the specific instruction that correctly answers the question? Petitioner in this case asserts, in essence, that the Constitution establishes a *per se* rule that such a response is insufficient. Brief for Petitioner 19-20. Such a rule would not only be "new" and not "clearly established," see part III, *infra*, at 14-18, it would be contrary to the overwhelming weight of authority.

The *Teague* survey begins with Supreme Court case law. See *Caspari* v. *Bohlen*, 510 U. S. 383, 391-393 (1994). Cases in this area often quote the statement from *Bollenbach* v. *United States*, 326 U. S. 607, 612-613 (1946): "When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy." Sweeping statements in opinions must always be considered in the context of the cases that produce them. The events in *Bollenbach* contrast sharply with the present case.

Bollenbach involved a conspiracy of theft, interstate transportation, and sale of securities. *Id.*, at 608. The defendant was clearly involved in the final sale. *Ibid.* That is, he was a "fence." *Id.*, at 611. He was not being tried for "fencing," though, but rather for the interstate transportation of the securities and conspiring to commit that offense. *Id.*, at 608.

The jury asked whether an act of conspiracy could be performed after the crime was committed. *Id.*, at 609. Unlike the present case, the judge did not refer them to earlier instructions but instead crafted a supplemental instruction, including a presumption that a person in possession of stolen property shortly after the theft in another state "was the thief and transported stolen property in interstate commerce." *Ibid.* *Bollenbach* is thus a case of a "palpably erroneous answer by the judge to the jury's inquiry," *id.*, at 611, and its language must be interpreted with this in mind.

Bollenbach does not say or imply that the judge may not answer the question by reference to correct, previously given instructions. That question was not presented by the facts of the case, and general statements in opinions should not be taken to answer questions not in issue. Those questions should be resolved later, in cases where they are actually presented. See *Cohens* v. *Virginia*, 6 Wheat. (19 U. S.) 264, 399-400 (1821). No subsequent Supreme Court case answers the question.

Turning to state and circuit precedents, the cases are legion holding that, in this situation, the trial judge may either give a supplemental instruction or refer to the instruction already given, in the judge's discretion. The Supreme Court of New Hampshire's treatment of the issue in *State* v. *Dedrick*, 607 A. 2d 127 (1992) is typical. After noting that the court could have "engage[d] in further dialogue" with the jury, it held, "It is equally proper, however, to refer the jury to the complete and adequate instructions previously given." *Id.*, at 129.

Other decisions to the same effect include, among many others, *People* v. *Davis*, 10 Cal. 4th 463, 522, 896 P. 2d 119, 151 (1995), *Boothe* v. *People*, 814 P. 2d 372, 374-375 (Colo. 1991), *State* v. *Neujahr*, 540 N. W. 2d 566, 573 (Neb. 1995), *United States* v. *Smith*, 104 F. 3d 145, 148-149 (CA8 1991), and *United States* v. *Span*, 170 F. 3d 798, 802 (CA7 1999). Indeed, the trial judge is not even required to go as far as the judge in the present case did, by pinpointing the specific paragraph in the specific instruction that answered the question.

In *Span*, the trial judge merely provided a written copy of the entire set of instructions. *Span*, 170 F. 3d, at 802, and n. 2. The Court of Appeals held, "It was not necessary for the district judge to direct the jury to specific sections of the instructions . . . ." *Id.*, at 802.

"The [trial] court has considerable discretion in deciding whether to grant . . . a request [for additional instructions]." 2 C. Wright, Federal Practice and Procedure—Criminal § 502, p. 827 (2d ed. 1982). Appellate courts reviewing the exercise of this discretion must be ever mindful of the difficulty of the task. See *id.*, at 831 (quoting *United States* v. *Walker*, 575 F. 2d 209, 214 (CA9 1978)). Trial judges are understandably reluctant to deviate from standard instructions when those instructions "cover the bases." Time-tested instructions are more likely to accurately state the law than new ones crafted ad hoc. They are also less likely to be reversed by another court down the line, based on a perceived ambiguity which no one at the trial thought was there. As one frustrated trial judge put it, "Every time a judge opens his big mouth and tries to explain what an instruction means, he puts his foot in it and the Appellate Court promptly bites it off." *People* v. *Beardslee*, 53 Cal. 3d 68, 96, 806 P. 2d 1311, 1325 (1991).

The trial judge must, of course, exercise discretion. It is error to announce in advance that the judge will not deviate from the standard. See *id.*, at 97, 806 P. 2d, at 1326; see also Cal. Standards of Judicial Administration § 5. However, when the trial judge considers the matter and determines that the standard instruction is the best answer, that determination is entitled to broad deference.

There are, of course, some cases finding abuse of discretion in the failure to give a sufficient supplemental instruction.

These cases typically involve instructions which are deficient or do not answer the question.[2]

A prime example of an erroneous response to a jury question is *United States* v. *Nunez*, 889 F. 2d 1564 (CA6 1989). In a conspiracy case involving two defendants and a government agent, see *id.*, at 1566, the jury asked if an agreement between one defendant and the agent made a conspiracy. *Id.*, at 1567. The answer, under circuit precedent, was no. *Id.*, at 1569. "[T]he trial court repeated its earlier definition of a conspiracy," and added a supplemental instruction which merely referred to "two or more persons," without distinguishing government agents from others. *Id.*, at 1567-1568.

The Sixth Circuit recognized the general rule. "If the issue that is the subject of an inquiry has been fully covered in the court's instructions, a reference to or rereading of the instructions may suffice." *Id.*, at 1569. The problem in *Nunez* was that the predicate for this rule was not met. The problem of one of the "conspirators" being a government agent was not covered by the instruction. *Id.*, at 1568. *Nunez* is entirely different from the present case, in which the specific question is addressed by the standard instruction. *Buchanan* v. *Angelone*, 522 U. S. 269, 277-278, n. 4 (1998).

Nunez was followed in *United States* v. *Warren*, 984 F. 2d 325 (CA9 1993). The jury, pondering premeditation in a murder case, asked, "Is premeditated to 'hurt' the same as premeditated to 'kill'?" *Id.*, at 329. The standard instruction focused on the nature rather than the object of premeditation, and therefore did not answer the question. *Id.*, at 329-330, and n. 7.

A survey of the legal landscape in general criminal cases of the time Weeks' conviction and sentence became final reveals

2. An exception is *McDowell* v. *Calderon*, 130 F. 3d 833 (CA9 1997), discussed in part II, *infra*, which *amicus* believes to be wrongly decided.

several points. First, there was no Supreme Court case holding that reference to a correct, pertinent instruction was an inadequate response to a jury question. Second, the overwhelming, if not unanimous, weight of state and circuit authority was squarely to the contrary. Third, the cases holding that reference to a previously given instruction was insufficient in a particular case are distinguishable, in that the instruction did not directly address the question.

If the question involved the guilt phase of a noncapital case, this survey would be sufficient to dispose of the question, either under *Teague* or 28 U. S. C. § 2254(d). Because the Ninth Circuit in *McDowell*, *supra*, thought the Eighth Amendment cases made a difference, we proceed to that question.

II. Nothing in existing Eighth Amendment precedents alters the rule of the trial judge's discretion in these matters.

Calls to impose additional constitutional restrictions in capital cases are generally based "on the predicate that the *penalty* of death is qualitatively different from a *sentence* of imprisonment, however long." *Woodson* v. *North Carolina*, 428 U. S. 280, 305 (1976) (plurality opinion) (emphasis added). This predicate explains why the sentencing phase of a capital case requires more stringent safeguards than the *sentencing* phase of a noncapital case. It would also support a call for a more stringent safeguard in the guilt phase of capital versus noncapital cases. See, *e.g.*, *Beck* v. *Alabama*, 447 U. S. 625, 627 (1980). It does not explain or support what petitioner asks in the present case, however—a rule forbidding in the penalty phase of capital cases a practice overwhelmingly approved in the guilt phase of noncapital cases.

The point can be clearly seen by comparing the present case with *State* v. *Dedrick*, 607 A. 2d 127 (N.H. 1992). Dedrick was accused of murder and claimed self-defense. *Id.*, at 128.

Weeks is unquestionably guilty of capital murder. He gunned down Trooper Jose Cavazos in the performance of his duty without a shred of provocation, justification, or excuse. See *Weeks* v. *Commonwealth*, 450 S. E. 2d 379, 382-383 (Va. 1994). If Dedrick's jury misunderstood the law of self-defense, there was a danger that a man innocent of murder would go to prison for fifteen to thirty years. See 607 A. 2d, at 128. In the present case, the worst that could happen is that a guilty murderer, who chose to take the life of a peace officer for no reason, will receive a punishment within the range which the law prescribes for that offense, despite circumstances which some may believe call for leniency.

Which of these two cases presents a greater potential for injustice? Which of the two has the greater claim to safeguards for the defendant? Only the most fanatical opponents of capital punishment would answer with the present case. Yes, death is qualitatively different from imprisonment of any length, but so, too, is guilt versus innocence qualitatively different from *any* punishment, death included. The conviction and lengthy imprisonment of an innocent person is a vastly greater injustice than the execution of *any* person actually guilty of capital murder, regardless of mitigating circumstances.

This distinction is recognized in the cases defining the "fundamental miscarriage of justice" exception to the procedural default rule. The wrongful conviction of a person who is innocent of the crime is the greatest injustice and therefore has the lowest threshold to qualify for the exception. *Schlup* v. *Delo*, 513 U. S. 298, 325-326 (1995). A claim that the defendant, although guilty of murder, was not eligible for the death penalty stands on a lower footing and requires the claimant to meet a more rigorous standard. *Id.*, at 326, n. 44. A defendant eligible for the death penalty, even if claiming overwhelming mitigating circumstances, cannot claim the "fundamental miscarriage of justice" exception at all. See *Sawyer* v. *Whitley*, 505 U. S. 333, 347 (1992).

The same principle that underlies the three-tiered standard of the *Sawyer/Schlup* rule also applies to trial procedure. "Our recognition of the significant difference between the injustice that results from an erroneous conviction and the injustice that results from an erroneous sentence is reflected in our decisions that permit reduced procedural protections at sentencing. See, *e.g.*, *Williams* v. *New York*, 337 U. S. 241 (1949)." *Schlup*, *supra*, 513 U. S., at 326, n. 44. This principle applies to capital cases as well as noncapital. *Schlup*, *Sawyer*, and *Williams* were all capital cases, and *Williams* expressly rejected a "death is different" argument. *Williams* v. *New York*, 337 U. S. 241, 251-252 (1949).

In terms of constitutional claims for procedural protections, then, the sentencing phase of a capital case stands on a middle ground between the guilt phase of any major felony case, capital or noncapital, and the sentencing phase of a noncapital case. Some guilt-phase protections are not extended to capital penalty proceedings. See, *e.g.*, *Walton* v. *Arizona*, 497 U. S. 639, 647 (1990) (jury trial). On the other hand, there are some protections given to defendants in the capital penalty phase which are given to defendants in the guilt phase of trials but not in noncapital sentencing proceedings. These include the protection against double jeopardy, see *Monge* v. *California*, 524 U. S. 721, 734 (1998), and a type of confrontation right. See *Gardner* v. *Florida*, 430 U. S. 349, 362 (1977) (disclosure and opportunity to deny or explain information in presentence investigation). There is no basis, however, to hold that a procedure which would be perfectly valid in determining guilt is somehow unconstitutional when employed in the sentencing

phase of a capital case.[3] That, in essence, is the rule petitioner seeks in this case.

Petitioner's proposed rule is said to follow from *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982). See *McDowell* v. *Calderon*, 130 F. 3d 833, 841 (CA9 1997) ("*Bollenbach* is not driving this case; *Eddings* is."). With all due respect to the *McDowell* majority, they are the ones who are "off target." Cf. *ibid.* *Eddings* is a rule of substantive law, not a rule of trial procedure.

In *Eddings*, the trial judge, who was the sentencer, stated flatly that he believed he was precluded by law from considering a major component of the defendant's case in mitigation. 455 U. S., at 109. There is no doubt what the *Eddings* Court considered to be the jury trial equivalent of this situation: "In this instance, it was as if the trial judge had instructed a jury to disregard the mitigating evidence . . . ." *Id.*, at 114. *Eddings* says nothing at all about the issue in dispute in this case, *i.e.*, the scope of the trial judge's discretion in answering jury questions. See *McDowell*, 130 F. 3d, at 844 (Kozinski, J., dissenting).

McDowell, 130 F. 3d, at 840, also relies on *Mills* v. *Maryland*, 486 U. S. 367 (1988). *Mills* involved a verdict form which could be interpreted as excluding from consideration any mitigating evidence on which the jury could not agree unanimously. *Id.*, at 384. Yet the *McDowell* Court itself quotes the passage of *Mills* that distinguishes it: "That reasonable men might derive a meaning from the instructions given other than the proper meaning of the statute *is probable*." *McDowell*, 130 F. 3d, at 840 (quoting *Mills*, 486 U. S., at 377) (emphasis

3. *Turner* v. *Murray*, 476 U. S. 28 (1986) reached such a result, but a splintered opinion with no coherent rationale attributable to a majority, which *Turner* is, is ripe for reconsideration when the issue comes up again. See *Nichols* v. *United States*, 511 U. S. 738, 745-746 (1994). *Mu'Min* v. *Virginia*, 500 U. S. 415, 424 (1991) implies in dicta that the *Turner* rule might apply to the guilt trial as well.

added). The instruction at issue in *Mills* was not a correct instruction. It failed the probability test, subsequently clarified in *Boyde* v. *California*, 494 U. S. 370, 380 (1990).[4]

The essence of *McDowell*, and of petitioner's argument, is that the assessment of reasonable probability under *Boyde* must be reconsidered when the jury asks a question. What the question shows in the present case is that one or more jurors, but *not* the jury as a whole, did not understand the role of mitigation on the first reading. As a matter of common experience, even the clearest instructions may be misunderstood by some of the people some of the time, particularly when they are included in a long list of instructions for a complex task. Every parent who has ever assembled a bicycle on a holiday eve knows this. It is also a matter of common experience that the misunderstanding can often be corrected by pointing out the specific passage that answers the question. The trial judge believed that procedure would be effective in this case, and the postverdict poll of the jury confirms he was correct.

Given the rule in the guilt phase of criminal trials generally that the trial judge has the discretion to refer the jury to the previous, correct, pertinent instruction, the question reduces to whether the Eighth Amendment establishes a different rule for the penalty phase of capital cases. On direct appeal, a strong argument could be made for a negative answer, based on the principle that the sentencing phase allows the trial judge greater leeway, not less. See *supra*, at 9-12. As this case arises on federal habeas corpus, though, two other and even more straightforward questions arise: (1) was a positive answer dictated by precedent binding on the state court at the time Weeks' sentence became final; and (2) was the state court's negative answer "contrary to . . . clearly established Federal

4. To the extent *Mills* used other standards, see *id.*, at 379, it was effectively overruled in *Boyde*. See *Estelle* v. *McGuire*, 502 U. S. 62, 72-73, n. 4 (1991) (expressly disapproving language in two other cases inconsistent with *Boyde*).

law, as determined by" this Court? 28 U. S. C. § 2254(d)(1). In the context of the question presented in this case, these questions are substantially the same, and the answer to both is no.

III. Petitioner's proposed rule is neither "dictated by precedent" nor "clearly established."

A. Applicability of the AEDPA.

Petitioner seeks reversal of a judgment holding that his claim is precluded by the new habeas statute, 28 U. S. C. § 2254(d) enacted as part of the landmark Antiterrorism and Effective Death Penalty Act ("AEDPA"), 110 Stat. 1218 (1996). See *Weeks* v. *Angelone*, 176 F. 3d 249, 257-258, 261 (CA4 1999). Astonishingly, he does not even cite, much less discuss, the statute in his brief. Oblique references to "de novo review" and the Virginia Supreme Court's supposedly "unreasonable" decision constitute the entirety of his AEDPA discussion. See Brief for Petitioner 17, n. 9, 25, n. 11.

Petitioner claims that the new standard is inapplicable because the Virginia Supreme Court's decision was "perfunctory." *Id.*, at 17, n. 9. Acceptance of this argument in this case would empower defendants to evade a major Act of Congress by the simple expedient of inadequate briefing.

The Virginia Supreme Court's discussion of this point was "perfunctory" for an entirely valid reason. Weeks' brief utterly failed to present an argument of any substance. The point in question was Assignment of Error 44. J. A. 253. The argument on this point merely incorporated the argument on another point. J. A. 270. That argument, in turn, merely recited the underlying rule of mitigation. J. A. 267. The brief is devoid of any discussion of the rule that the trial judge may refer to prior, correct instructions in response to a jury question, and it made no attempt to explain why that rule is inapplicable to the present case.

A strong argument can be made that the issue was not "fairly presented" to the state court and therefore is procedurally defaulted. See *Castille* v. *Peoples*, 489 U. S. 346, 351 (1989). Assuming *arguendo* that Weeks just barely met the threshold for fair presentation, his argument got the treatment it deserved. To write a full opinion on this point, the state court would have had to research the pertinent authorities through its own staff without the benefit of briefing. This is not a normal mode of operation for appellate courts.

Congress intended that the judgments of state courts be respected in the lower federal courts as the product of a coordinate, coequal branch of the American judicial system.[5] See Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power, 98 Colum. L. Rev. 888, 953, 958 (1990); CJLF *Williams* Brief 7-8; *Sawyer* v. *Smith*, 497 U. S. 227, 241 (1990) ("coequal"). Congress could not conceivably have intended that this requirement could be defeated by hopelessly inadequate briefing on defendant's part or made dependent on extraordinary *sua sponte* legal research by state appellate courts.

The question of how to handle a state decision which ignores or summarily dismisses a fully developed argument can wait for a case which presents it. So, too, can the question of how to apply the "unreasonable application" requirement of § 2254(d)(1) to a summary decision. The present case is easily decided on the "clearly established" requirement.

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5. AEDPA does not impair the authority of this Court to exercise plenary review of state decisions, although it does limit the vehicles for such review. That is, de novo review is limited to certiorari to state courts and not review of collateral attacks on state decisions in the lower federal courts. *Stone* v. *Powell*, 428 U. S. 465 (1976) placed the same limitation on Fourth Amendment exclusion cases 20 years earlier, and it has not materially impaired this Court's ability to shape that area of the law.

B. Rules and Applications.

The pre-AEDPA jurisprudence under *Teague* v. *Lane*, 489 U. S. 288 (1989) distinguished between new rules of law and applications of existing rules. New rules were subject to the *Teague* limitation, while applications of existing general standards to varying fact patterns were not. See, *e.g.*, *Thompson* v. *Keohane*, 516 U. S. 99, 106-107 (1995) (de novo relitigation of "mixed question of law and fact"). The distinction between the two was not always clear. See *Wright* v. *West*, 505 U. S. 277, 307 (1992) (Kennedy, J., concurring in the judgment).

In the statute, Congress has continued to treat law declaration and law application as separate concepts, although the difference in treatment is not as stark as under *Teague*. See CJLF *Williams* Brief 23; Scheidegger, *supra*, 98 Colum. L. Rev., at 959. The state court's decision stands unless it failed to apply the applicable, clearly established Supreme Court precedent ("contrary to") or unless, having applied the rule, it unreasonably applied it to the facts of the case. In either event, the rule must have been "clearly established," a term borrowed from *Sawyer*, *supra*, 497 U. S., at 236, which in turn borrowed it from the qualified immunity cases. If the rule petitioner asserts is not "clearly established," the case is over. A state decision cannot be contrary to or an unreasonable application of a nonexistent rule.

Petitioner in this case makes the same erroneous argument that this Court has rejected time and again in *Teague* cases. He asserts his rule at an excessive level of generality, a level that would render both *Teague* and § 2254(d)(1) meaningless. See *Sawyer*, *supra*, 497 U. S., at 236; *West*, *supra*, 505 U. S., at 311-313 (Souter, J., concurring in the judgment).

A comparison of *Sawyer* with *West* illustrates the point. *West* involved the sufficiency-of-evidence rule of *Jackson* v. *Virginia*, 443 U. S. 307, 324 (1979). This is a general standard, incapable of precise definition, which must necessarily be

applied case-by-case to myriad fact patterns. See *West*, *supra*, 505 U. S., at 308-309 (Kennedy, J., concurring in the judgment). *Sawyer* involved the rule of *Caldwell* v. *Mississippi*, 472 U. S. 320, 332-334 (1985) regarding prosecutors' reference to appeals in their closing arguments. *Caldwell* was a crystallized rule of law governing a specific legal question. Although it was derived from general Eighth Amendment principles, none of the constitutional precedents it relied on dealt with prosecutor arguments or telling the jury about appeals. See *Sawyer*, *supra*, 497 U. S., at 235. *Caldwell* was a new rule, not an application of existing rules. *Id.*, at 238.

The present case fits snugly into the mold of *Sawyer*. The *Lockett* line of cases established the rule of substantive law regarding what the sentencer must consider. These cases do not deal with the question of how to handle jury questions about correct instructions; they deal with invalid statutes or with incorrect instructions or equivalents. See *Lockett* v. *Ohio*, 438 U. S. 586, 607-608 (1978) (plurality opinion) (statute); *Eddings* v. *Oklahoma*, 455 U. S. 104, 114 (1982) (judge's error equivalent to incorrect instruction); *Mills* v. *Maryland*, 486 U. S. 367, 384 (1988) (incorrect instructions and forms).

The issue in this case, how much latitude a trial judge has in deciding how best to clear up a question which has arisen *despite* a correct instruction, is distinct from the rules governing what *is* a correct instruction. The creation of a constitutional rule limiting the judge's discretion would most assuredly plow new ground and impose a new burden on the states. Cf. *Teague*, *supra*, 489 U. S., at 301. Given the mountain of authority holding that the judge does have the discretion to answer jury questions in the manner employed in this case, it would be outlandish to assert that "in light of authority extant when [Weeks'] conviction became final, [the] unlawfulness [of the judge's response was] apparent." Cf. *Wright* v. *West*, *supra*, 505 U. S., at 313 (Souter, J., concurring in the judgment). Petitioner does not need a case with facts identical to his own, see *ibid.*, but he needs one addressing the same question of law.

He does not have one. The rule he seeks would be "new" under *Teague*, and it is not "clearly established" under 28 U. S. C. § 2254(d)(1). See *Neelley* v. *Nagle*, 138 F. 3d 917, 924-925 (CA11 1998) (similarity of "clearly established" to *Teague*); CJLF *Williams* Brief 19-20, 21-24. Petitioner's claim is precluded by both rules.[6]

IV. The trial judge's exercise of discretion on this point should not be considered a federal constitutional question.

Petitioner's contention that the Eighth Amendment governs the trial judge's exercise of discretion in this case raises the question of the extent of federal oversight of state courts. Is the Eighth Amendment going to permeate every last cranny of capital sentencing, so that *every* penalty phase claim automatically becomes a federal constitutional question? The case law has already traveled far down the road of inflating and devaluing the currency of the Eighth Amendment, and it is high time to ask if the Court should take the process any further.

In the general criminal law, it has long been settled that the Due Process Clause, fundamental fairness, and the cases implementing these requirements do not "establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure. And none of the specific provisions of the Constitution ordains this Court with such authority." *Spencer* v. *Texas*, 385 U. S. 554, 564 (1967); *Parke* v. *Raley*, 506 U. S. 20, 28 (1992). The Eighth Amendment is one of those "specific provisions."

The Eighth Amendment would appear on its face to be a purely substantive requirement with no procedural component. One would think that a given punishment, at least for a given crime, is either "cruel and unusual" or it is not, regardless of the procedure by which it is imposed. Even so, *Furman* v. *Georgia*, 408 U. S. 238 (1972) struck down the then-existing capital

6. The narrow *Teague* exceptions are obviously inapplicable.

sentencing statutes on Eighth Amendment grounds, based on systemic, structural deficiencies which rendered the systems as a whole capricious. See *id.*, at 309-310 (Stewart, J., concurring in the judgment). The splintered opinion raised more questions than it answered, though, and it took many years to answer the major questions of what kind of sentencing systems would be valid. See generally Scheidegger, Capital Punishment in 1987: The Puzzle Nears Completion, 15 West. St. L. Rev. 95 (1987).

With the structure in place, attacks on capital sentences have changed from broadside to stiletto. Federal courts now routinely "peer majestically over the [state] court's shoulder," *Lewis* v. *Jeffers*, 497 U. S. 764, 780 (1990) (quoting *Godfrey* v. *Georgia*, 446 U. S. 420, 450 (1980) (White, J., dissenting)), to scrutinize every detail of the penalty phase. Every piece of evidence, every phrase of argument, and every nuance of instructions are considered fair game.

The results of this micromanagement are often extremely doubtful. In *Rupe* v. *Wood*, 93 F. 3d 1434, 1440 (CA9 1996), a federal court threw out a death sentence because the state court had excluded a polygraph test which the examiner himself had declared unreliable. Cf. *United States* v. *Scheffer*, 523 U. S. 303, 317 (1998) (rule-making authority may categorically ban all polygraphs). In *Coleman* v. *Calderon*, 150 F. 3d 1105, 1118-1119 (CA9 1998), the same court overturned a judgment because the judge gave a commutation instruction of the type approved by this Court in *California* v. *Ramos*, 463 U. S. 992 (1983). The *Coleman* Court purported to distinguish *Ramos* on the ground that, in the individual case, the commutation power was not vested in the governor alone. 150 F. 3d, at 1119. This Court reversed on other grounds because it was not asked to review this ground, but the majority's skepticism of this ruling is evident. *Calderon* v. *Coleman*, 525 U. S. 141, 142 L. Ed. 2d 521, 527, 119 S. Ct. 500, 503 (1998).

What does all this relitigation accomplish? Does the reversal of an occasional death sentence based on a doubtful claim reasonably rejected by state courts make the capital

sentencing system less arbitrary, in the *Furman* sense? A strong argument can be made that such reversals make the system *more* arbitrary. On direct appeal, the state supreme court decides these questions with a reasonable uniformity, but on federal habeas the random assignment of individual district judges and three-judge appellate panels can bring widely varying approaches and attitudes to bear. A murderer's ultimate sentence should depend on what he did, not on which federal judges he draws.

The other effect of relitigating every detail over again in federal court is to drag out the proceedings for years. Extended delays severely impair the function of the death penalty. See *Lackey* v. *Texas*, 514 U. S. 1045, 1045-1046 (1995) (Stevens, J., respecting denial of certiorari); *Elledge* v. *Florida*, 142 L. Ed. 2d 303, 303, 119 S. Ct. 366, 367 (1998) (Breyer, J., dissenting from denial of certiorari). For the oldest cases, much of the problem was caused by high reversal rates, which were in turn caused in large part by the turmoil and uncertainty in the post-*Furman* capital punishment jurisprudence.[7] See *Lockett* v. *Ohio*, 438 U. S. 586, 622 (1978) (White, J., dissenting in part) ("about-face"); *id.*, at 629 (Rehnquist, J., dissenting) ("pillar to post"); *Morgan* v. *Illinois*, 504 U. S. 719, 751 (1992) (Scalia, J., dissenting) ("annually improvised" jurisprudence). The era of capital jurisprudence lurching erratically from side to side is, hopefully, behind us. For cases entering the pipeline in the 1990s, the litigation is likely to involve the administration of established rules within a tested, constitutional structure.

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7. Florida, for example, has twice suffered disapproval of practices used in large numbers of capital cases and reasonably believed to be consistent with, if not approved by, this Court's precedents. See K. Scheidegger, Overdue Process: A Study of Federal Habeas Corpus in Capital Cases and a Proposal for Reform 21 (1995) (discussing *Hitchcock* v. *Dugger*, 481 U. S. 393 (1987)); *Lambrix* v. *Singletary*, 520 U. S. 518, 537-538 (1997) (*Espinoza* v. *Florida*, 505 U. S. 1079 (1992) was contrary to suggestions in opinions as late as 1990).

The present case provides a prime example. To comply with the mandate of *Furman*, Virginia was required to narrow the death-eligible class with factors that meaningfully distinguish the potentially capital cases from the general pool of murders, and then it had to provide a vehicle for consideration of mitigating circumstances. See *Lowenfield* v. *Phelps*, 484 U. S. 231, 246 (1988). Virginia has done that. See Va. Code Ann. § 18.2-31 (narrowed definition of capital murder); § 19.2-264.2 (additional requirement of aggravating circumstance); § 19.2-264.4(B) (mitigation). It is not enough for legislatures and courts to declare this structure exists. The state must give the jurors instructions that convey to them the factors they must or may consider. See *Penry* v. *Lynaugh*, 492 U. S. 302, 328 (1989) (instructions did not provide jury with vehicle to give effect to mitigating evidence). The state has done that with its standard instruction. *Buchanan* v. *Angelone*, 522 U. S. 269, 277-278, n. 4 (1998).

The systemic problems that gave rise to *Furman* have been corrected. The death penalty in Virginia is imposed through a structured system of tested, constitutional statutes and standard jury instructions. The murderers on death row are not a "capriciously selected random handful," cf. *Furman*, *supra*, 408 U. S., at 309-310 (Stewart, J., concurring in the judgment), but a carefully selected product of a well-structured system.

In conducting a trial, judges must make a myriad of judgment calls. Each ruling arguably has some impact on some constitutional right, if those rights are extended far enough. "All rights tend to declare themselves absolute to their logical extreme." *Hudson County Water Co.* v. *McCarter*, 209 U. S. 349, 355 (1908) (Holmes, J.). Courts must resist this tendency. Every jury issue can be cast as a Sixth Amendment question. Every evidence question can be cast as a confrontation question, a self-incrimination question, or, if all else fails, a due process question. Such pervasive federal control of state proceedings is contrary to the fundamental structure of our federal system.

This case involves the routine exercise of a trial judge's discretion of the type that comes up every day. The judge gives the jury a correct, tested, standard instruction. A question indicates that at least one juror has failed to understand. The judge must decide whether the issue is best clarified by pinpointing the answer in the previously given standard instructions or by crafting a custom-made supplemental instruction. The judge considers the alternatives and decides that pinpointing the answer is the better approach in this case. See J. A. 223-224.

The question is much too far removed from *Furman* to be considered an Eighth Amendment question. *Furman* and its progeny should be understood to address those issues that would render a state's capital sentencing system *as a whole* an arbitrary system rather than a structured system. The routine administration of that system in individual cases should be considered a matter of state law. Trial judges must have a certain amount of discretion for the system to work. When they abuse that discretion, the remedy is appeal to the state appellate courts.

CONCLUSION

The decision of the Court of Appeals for the Fourth Circuit should be affirmed.

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Respectfully submitted,

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